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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD W. MURRAY, DIRECTOR;
VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

—v.—

JOSEPH M. GIARRATANO, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF *AMICUS CURIAE*
OF THE AMERICAN CIVIL LIBERTIES UNION
AND ITS NATIONAL PRISON PROJECT
IN SUPPORT OF RESPONDENTS**

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UNION AND ITS NATIONAL PRISON PROJECT

=====

The American Civil Liberties Union and
its National Prison Project hereby move for
leave to file the attached brief amicus
curiae pursuant to Rule 36.3 of the Rules

of this Court. The reason for this motion is that counsel for petitioners has refused to consent to the filing of an amicus curiae brief by the ACLU.

The ACLU is a nationwide, non-partisan, membership organization dedicated to defending the principles embodied in the Bill of Rights. It has participated in hundreds of cases before this Court, either as counsel for one of the litigants or as amicus curiae.

Through the work of its National Prison Project, the ACLU has developed a unique expertise on prison conditions throughout the country. That expertise is particularly relevant to the issue now before the Court -- namely, the indispensability of appointed counsel in enabling Death Row inmates to obtain meaningful access to the courts.

Accordingly, we respectfully move for leave to file the attached brief amicus curiae in the hope of assisting the Court in resolving the important constitutional questions presented by this case.

Respectfully submitted,

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INTEREST OF AMICI

The interests of amici are set forth in the motion attached to this brief.

STATEMENT OF THE CASE

Amici adopt the factual summary set forth in respondents' brief. In addition, we note the following facts regarding capital post-conviction proceedings in Virginia.

The Virginia Supreme Court applies a strict contemporaneous objection rule in reviewing capital murder convictions and death sentences. See Virginia Supreme Court Rule 5:25. Under this rule, a failure by trial counsel to object, to provide reasons for any objection, or to request a particular form of relief, irrevocably waives the point not raised below. (J.A. 89-90). On the basis of this rule, the

Virginia Supreme Court has recently refused to consider alleged errors that two Death Row inmates attempted to raise on direct appeal. Wise v. Commonwealth, 230 Va. 322, 377 S.E.2d 715 (1985), cert. denied, 475 U.S. 1112 (1986); Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422 (1985), cert. denied, 475 U.S. 1099 (1986). Thus, on the one appeal to the Virginia Supreme Court for which the Commonwealth supplies appointed counsel, an indigent person convicted of a capital crime may not be able to raise critical constitutional issues relating to his or her conviction or sentence.

The Virginia Supreme Court also does not review the entire record on direct appeal for errors in capital murder cases. Instead, the Virginia Supreme Court reviews only those questions assigned as error by

the parties, and the additional questions of whether a sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factors, and whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.

-Va. Code §17-110.1(C).

Issues precluded from consideration by the Virginia Supreme Court, either because of the contemporaneous objection rule or because they were not assigned as error, can be raised in state post-conviction proceedings if counsel was ineffective in failing to object or to assert the claim. See Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680, 682 (1974), cert. denied, 419 U.S. 1108 (1975). To avoid the consequences of waiver, however, the litigant must be prepared to make a persuasive showing that review of his or her claims in

post-conviction proceedings is appropriate. (J.A. 90-91, 150-151).

Until 1985, claims of ineffective assistance of trial counsel could not be raised at all on direct appeal as a matter of Virginia law, and thus were always raised only in post-conviction proceedings. (J.A. 87-88). The severity of this rule was to some extent modified in 1985 with the enactment of Va. Code §19.2-317.1, which provides that claims of ineffective assistance of counsel based on matters fully contained in the record may be raised on direct appeal. In most instances, however, the ineffective assistance of counsel will not be apparent from the record alone. (J.A. 88). As of the time this case was tried, there had been only one capital appeal in which the Virginia Supreme Court addressed a claim of ineffec-

tive assistance of counsel raised under §19.2-317.1. In that case, the Virginia Supreme Court ruled that the ineffective assistance claims could not be resolved on direct appeal based on the trial record:

[W]e will not rule as a matter of law, upon this record, that counsel's conduct was consistent with reasonable trial strategy and therefore was not ineffective. We will not impute to counsel a certain rationale and thereby deny the defendant the opportunity to demonstrate, by evidence which might be obtained in a plenary hearing, that counsel had no such tactical basis for his actions.

Frye v. Commonwealth, 231 Va. 270, 345 S.E.2d 267, 288 (Va. 1986). The Death Row inmate in Frye was therefore required to raise his claim of ineffective assistance of counsel in post-conviction proceedings -- precisely the proceedings in which the state refuses to provide counsel. (J.A. 165, 276-277, 287-288).

As a practical matter, the issue of ineffective assistance of counsel will almost always be litigated in habeas corpus proceedings rather than on direct appeal. In Virginia, as in most states, the attorney appointed for trial is usually the same attorney who prosecutes the direct appeal. (J.A. 276-277). That attorney is unlikely to challenge his or her own effectiveness at the prior trial. Nor is there adequate time to investigate completely claims of ineffective assistance of counsel in the time allotted for direct appeal. (J.A. 88-89) Claims of ineffective assistance of appellate counsel, of course, can only be raised in habeas corpus proceedings.

Finally, Virginia law severely restricts a pro se inmate's ability to file a second habeas petition in order to raise

legal issues that may have been omitted inadvertently from the first petition. Rather, "all claims, the facts of which are known at the time of filing, must be included in [the initial] petition as they may not be raised successfully in a subsequent filing and those claims also could not be considered in federal court because federal courts generally may not consider claims barred by Virginia procedural rules." Giarratano v. Murray, 847 F.2d 1118, 1120 n.4 (4th Cir. 1987) (en banc), citing Whitley v. Bair, 802 F.2d 1487 (4th Cir. 1986), cert. denied, 107 S.Ct. 1618 (1987).

SUMMARY OF ARGUMENT

The right to be represented by counsel at the trial and appellate stages of a criminal prosecution has been recognized by

this Court as a fundamental right for over a quarter of a century. This recognition reflects the fact that it is through counsel that all other rights of the accused are protected. The need for vigorous advocacy is no less crucial in post-conviction proceedings involving the death penalty. Indeed, the risk of error engendered by the absence of counsel in collateral challenges is unique in death cases and is inconsistent with the reliability this Court has demanded in capital cases. For that reason, Congress has recently recognized the importance of counsel in collateral proceedings for death-sentenced prisoners.

Even if this Court does not extend the right to counsel to all capital cases at the post-conviction stage, the right should attach to Virginia's post-conviction pro-

ceedings because in certain important respects they operate as a substitute for appeal. By virtue of Virginia state court procedure, certain constitutional claims cannot be resolved on direct appeal but must be litigated in state court collateral proceedings. On those issues, collateral review is the only review possible and the constitutional right of counsel therefore attaches for indigent defendants.

Finally, the trial court and the en banc court of appeals correctly weighed the special needs of Death Row prisoners in holding that this Court's decision in Bounds v. Smith, 430 U.S. 817 (1977), requires the appointment of counsel in state post-conviction proceedings in order to assure meaningful access to the courts.

ARGUMENT

I. THE RATIONALE OF GIDEON v. WAINWRIGHT AND DOUGLAS v. CALIFORNIA REQUIRES COUNSEL IN STATE POST-CONVICTION PROCEEDINGS FOR DEATH-SENTENCED INMATES

The Sixth Amendment right to be represented at trial by counsel is a fundamental right of criminal defendants; it assures the fairness and legitimacy of our adversary process. Gideon v. Wainwright, 372 U.S. 335, 344 (1963). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975).

In a criminal proceeding, the defendant's liberty, and perhaps life, depend on the ability to confront "the intricacies of the law and the advocacy of the public prosecutor," United States v. Ash, 413 U.S.

300, 309 (1973). Absent representation, however, it is unlikely that a criminal defendant will be able to test the government's case adequately for, as Justice Sutherland wrote in Powell v. Alabama, 287 U.S. 45 (1932), "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law." Id. at 69. Thus, a criminal trial is not conducted in accord with due process of law unless the defendant has counsel. Gideon, 372 U.S. at 345; cf. Perry v. Leeke, No. 87-6325 (January 10, 1988), slip op. at 6.

The commitment to the adversary process is no less crucial on appeal of a criminal conviction than it is at the trial stage. Accordingly, this Court has held that the Fourteenth Amendment guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards

necessary to make that appeal "adequate and effective." See Griffin v. Illinois, 351 U.S. 12, 20 (1956). These safeguards include the right to counsel. Douglas v. California, 372 U.S. 353 (1963). Earlier this Term, the Court reaffirmed Douglas and commented at length on the necessity of counsel in appellate proceedings, as follows:

The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not foregone and that substantial legal and factual arguments are not inadvertently passed over. As we stated in Evitts v. Lucey, 469 U.S. 387 (1985):

"In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To

prosecute the appeal, a criminal appellant must face an adversary proceeding that -- like a trial -- is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant -- like an unrepresented defendant at trial -- is unable to protect the vital interests at stake." Id., at 396.

Penson v. Ohio, 109 S.Ct. 346, 352 (1988).

The most compelling argument for extending Gideon and Douglas to state post-conviction proceedings in capital cases is the risk of an erroneous execution.

Lockett v. Ohio, 438 U.S. 586, 605 (1978).

Any such risk is intolerable when the appointment of counsel would so clearly enhance the reliability of the conviction and sentence. See Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (weighing the probable value of procedural safeguards against the risk of an erroneous deprivation of life

if those safeguards are not provided); Beck v. Alabama, 447 U.S. 625, 637-638, 643 (1980) (assessing risk of erroneous conviction relative to enhanced reliability resulting from additional procedural safeguards).^{1/}

Indeed, the insistence on rigorous fact-finding procedures and a fair adversary process has been a consistent theme of this Court's death penalty jurisprudence. "This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." Ford v. Wainwright, 477 U.S. 399, 411 (1986).^{2/}

^{1/} The weighing of risks undertaken by the Court in Ake and Beck is consistent with this Court's traditional due process analysis. See e.g., Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

^{2/} See also Johnson v. Mississippi, 108 S.Ct. 1981, 1986 (1988); Maynard v. Cartwright, 108 S.Ct. 1853, 1858 (1988).

The same point was made in slightly different terms in Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.

Thus, long before this Court established the right to counsel in all felony cases, Gideon v. Wainwright, supra, it recognized that right in capital cases. Powell v. Alabama, 287 U.S. 45, 71-72 (1932). Likewise, this Court has often required special procedures to ensure the reliability of capital verdicts, both at trial^{3/} and in post-conviction proceedings.^{4/}

^{3/} E.g., Ake v. Oklahoma, supra.

^{4/} E.g., Ford v. Wainwright, supra.

For similar reasons, the ineffective assistance of counsel is especially devastating in capital cases. For most defendants, moreover, collateral review is the only available avenue for raising a claim of inadequate representation. As the Court stated in Kimmelman v. Morrison, 477 U.S. 365, 378 (1986) (citations omitted):

A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance, cf. Powell v. Alabama, supra; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal.

Although Kimmelman did not involve a claimed right to counsel in post-conviction proceedings, the Court's discussion in

Kimmelman has direct application to the case at bar. Collateral review is an empty promise for indigent defendants who may have suffered from inadequate representation at trial or on direct appeal but who cannot afford to "consult[] another lawyer." Id. Without appointed counsel, a defendant in these circumstances is left at sea in pursuing a claim that may call into question the fairness of the conviction yet was never addressed by either the trial or appellate courts.

It is particularly anomalous to deny counsel in state post-conviction proceedings now that Congress has determined that counsel is required in all federal habeas cases involving the death penalty, including those brought by state prisoners under 28 U.S.C. §2254. See Pub. L. No. 100-690, §7001, 102 Stat. 4181 (1988). If petition-

ers prevail here, the provision of counsel in §2254 proceedings will be largely meaningless for death-sentenced prisoners challenging their state convictions because many constitutional claims will have been waived in uncounseled state post-conviction proceedings. For Virginia prisoners, in particular, the issues raised in the petition for collateral relief in state court shape the issues that the prisoner can raise in any subsequent state or federal collateral challenges. See Whitley v. Bair, 802 F.2d 1487 (4th Cir. 1986), cert. denied, 107 S.Ct. 1618 (1987).^{5/}

In the past, this Court has looked to evolving standards of decency in determining whether a particular punishment comports with the fundamental human dignity

^{5/} See also Va. Code §801-654(B)(2).

required by the Eighth Amendment. Ford v. Wainwright, 477 U.S. at 406; Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). The congressional action providing counsel in all federal habeas proceedings involving the death penalty is strong evidence that contemporary values and evolving standards of decency require that capital punishment not be imposed without the provision of counsel at all stages of review.

This Court is well aware of the significant number of cases in which condemned prisoners have succeeded in having either their convictions or sentences vacated in post-conviction collateral proceedings. See Barefoot v. Estelle, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting) (observing that between 1976 and 1983, approximately 70% of all Death Row inmates who took their

cases to the federal courts of appeals obtained a reversal of their convictions or sentences). To consign the responsibility for discovering error in a case in which the stakes are so high to those who are unschooled in the vagaries of death penalty law^{6/} -- and not infrequently functionally illiterate^{7/} -- directly ignores the logic

^{6/} Because of the complexity of many capital cases, the new congressional statute establishes experience standards for attorneys representing capital defendants in federal court. Trial attorneys must have at least five years' experience practicing as a member of the local bar and at least three years' experience trying felony prosecutions in the appointing court. Attorneys appointed after trial must have been admitted to practice before the court of appeals for not less than five years, and must have had at least three years' experience handling felony appeals in appointing court. Pub. L. No. 100-690, §7001, 102 Stat. 4181.

^{7/} At the end of 1987, 22.5% of those prisoners on Death Row nationwide had completed the eighth grade or less, and another 36.7 percent had not completed high school. Capital Punishment 1987, Bureau of Justice Statistics, U.S. Department of Justice. According to the Director of Correctional Statistics for the Bureau, 24 of 57 prisoners

(continued...)

of Gideon and Douglas, as well as Powell v. Alabama.^{8/}

We recognize that this Court's decisions in Ross v. Moffit, 417 U.S. 600 (1974), and Pennsylvania v. Finley, 107 S.Ct. 1990 (1987), reject the argument that the appointment of counsel is required in all state collateral proceedings. Neither Ross nor Finley, however, involved the

^{7/} (...continued)
confined in a Virginia death row for this same period had a ninth grade education or less. (Telephone conversation of January 3, 1989, between Lawrence Greenfeld, Director of Correctional Statistics for the Bureau of Justice Statistics, and Mark J. Lopez, on the Brief for Amici).

^{8/} The problem is compounded because, as the district court found, even if Death Row inmates have the intellectual capability to pursue their own claims, they are by and large too emotionally debilitated by the stresses of impending death to prosecute their claims effectively. Giarratano v. Murray, 668 F.Supp. 511, 513 (E.D.Va. 1986). See Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 Journal of Criminal Law and Criminology, 867-869 (1983).

death penalty. For the reasons given above, their holdings should not be extended to this case.^{9/}

II. WHERE STATE POST-CONVICTION PROCEEDINGS IN CAPITAL CASES ARE A SUBSTITUTE FOR APPEAL, THE FOURTEENTH AMENDMENT REQUIRES APPOINTMENT OF COUNSEL

As noted in our statement of the case, Virginia law effectively bars claims of

^{9/} For the reasons given in respondents' brief, affirmance of the lower court will not raise the specter of additional litigation of constitutional claims. But even if affirmance would generate some costs in reducing the finality of certain judgments, these costs would be outweighed by the constitutional interests involved. In Kimmelman, the Court was confronted with a similar argument that its holding in Stone v. Powell, 428 U.S. 465 (1976), would be eviscerated by allowing prisoners to raise Fourth Amendment claims in the context of a Sixth Amendment claim of ineffective assistance of counsel. The Court unanimously held (with three Justices concurring), that the costs associated with allowing the claims to proceed could not justify the risk of constitutionally deficient assistance of counsel. As the Court observed in Kimmelman: "The Sixth Amendment mandates that the state bear the risk of constitutionally deficient assistance of counsel." 477 U.S. at 379.

ineffective assistance of counsel on direct appeal when the basis for the claim cannot be fully determined within the contours of the trial record. See Frye v. Commonwealth, supra. Accordingly, the first opportunity for a prisoner awaiting execution to have this constitutional claim reviewed in Virginia occurs when the prisoner is able to file a state court collateral attack on the conviction and sentence.

Because Virginia state court procedure defers resolution of this critical constitutional issue to its collateral proceedings, those collateral proceedings are critical to the integrity of the process by which Virginia imposes the death sentence. Having chosen to make its collateral proceedings a substitute for direct appeal in this vital respect, Virginia must also

assume the obligation of providing indigent defendants with appointed counsel under Douglas v. California and Penson v. Ohio.

The constitutional basis for that obligation was recently explained by this Court:

Due Process emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. Equal Protection, on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. In cases like Griffin and Douglas, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants -- indigent ones -- differently for purposes of offering them a meaningful appeal.

Evitts v. Lucey, 469 U.S. 387, 405 (1985)

(footnote omitted). Both due process and

equal protection concerns are implicated in this case.

A. Due Process

Once a state has created an appeal as of right, a criminal defendant is constitutionally entitled to the effective assistance of counsel on that appeal. In Evitts, this Court specifically rejected the state's argument that "whatever a state does or does not do on appeal -- whether or not to have an appeal and if so, how to operate it -- is of no due process concern to the Constitution" Id. at 400. Rather, this Court held in Evitts that once Kentucky had established an appeal as of right, the Due Process Clause controlled the manner in which the right could be curtailed. Id. at 400-401. The state also argued in Evitts that it did not provide an appeal as of right but only an appeal

conditioned on compliance with state procedural rules. This Court disagreed, noting that the defendant did not otherwise have "an adequate opportunity to present his claims fairly in the context of the State's appellate process." Id. at 402, quoting Ross v. Moffit, 417 U.S. at 616 (1974).

Just as Kentucky could not recharacterize its right of appeal to deny meaningful review in Evitts, Virginia should not be able to deny meaningful review here simply because as a matter of its own criminal procedure such review takes place in a collateral proceeding rather than on a direct appeal. The essential fact is that, under Virginia law, collateral review offers the first opportunity for most

criminal defendants to present their claim of inadequate assistance of counsel.^{10/}

Surely, if full review of the competency of counsel were available in the Virginia Supreme Court, failure to raise counsel's competency in appropriate circumstances would itself give rise to a claim of inadequate representation under Evitts. It elevates form over substance to argue that there is no right to counsel at all when state procedure allocates review of the competency of counsel to collateral proceedings.^{11/} We therefore urge this

^{10/} See e.g., Penson v. Ohio, supra, holding that the appellate court could not decide the merits of a non-frivolous claim without appointing counsel even though an Anders brief had been filed.

^{11/} Pennsylvania v. Finley, 107 S.Ct. 1990 (1987), does not bar relief here. While this Court said in Finley that "the right to appointed counsel extends to the first appeal of right, and no further," id. at 1993, the Court assumed an appeal of right in which all existing claims could be raised and resolved. Because this assumption does not apply
(continued...)

Court to hold that because Virginia law has created a right to appeal that is functionally divided between direct and collateral proceedings, the right to appointed counsel can and must apply in both proceedings.

B. Equal Protection

Appeal to the Virginia Supreme Court from the trial court is the only direct appeal available within the Virginia state system of criminal appeals. Accordingly, Virginia could not deny to any convicted indigent, let alone an indigent prisoner sentenced to death, an automatic right to counsel to pursue an appeal in the Virginia Supreme Court. Douglas v. California, 372 U.S. 353 (1963).

11/ (...continued)
in this case, Finley does not govern resolution of the issue.

The indigent prisoner sentenced to death in Virginia who must take his or her ineffective assistance claim to a Virginia trial court on collateral review, rather than to the Virginia Supreme Court on an appeal as of right, is in the same position as the California indigent defendant in Douglas. As this Court noted in Douglas,

In California . . . once the court has "gone through" the record and denied counsel, the indigent has no recourse but to prosecute his appeal on his own, as best he can, no matter how meritorious his case may turn out to be. The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between "possibly good and obviously bad cases," but between cases where the rich man now can require the court to listen to argument of counsel before deciding the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit,

is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

Id. at 357-358.^{12/}

The distinction between rich and poor defendants also violates the principle of Evitts v. Lucey, supra. As argued previously, Evitts establishes that a state cannot provide an appeal as of right and then deprive the appeal of meaning in particular cases. Yet that is precisely

^{12/} This Court's decision in Ross v. Moffit, 417 U.S. 600 (1974), is readily distinguishable. In Ross, this Court held that an indigent defendant was not entitled to the appointment of counsel in a discretionary appeal. Unlike Douglas, the claims of the indigent defendant in Ross had been presented by a lawyer and passed upon by an appellate court. 417 U.S. at 614-615. The state thus met its obligation "to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." Id. at 616. By contrast, indigent prisoners are not given an opportunity to present critical claims of constitutional error with the assistance of counsel in the particular context of the Virginia appellate process.

what Virginia has done through its procedural rules. An indigent defendant sentenced to death in Virginia is assured counsel in only one segment of the proceedings that together comprise the first full appellate review of the trial. Defendants who retain their own counsel can and will be represented both on direct appeal and in any subsequent collateral proceedings. As a result, non-indigent defendants are in a position to press a claim of ineffective assistance of counsel that is functionally unavailable to indigent defendants.^{13/}

^{13/} The log : of Douglas and Griffin also protects the right to counsel in the first appeal subsequent to the trial court's ruling on post-conviction relief. Application of this principle requires that this Court extend the right of counsel in state collateral proceedings to the first level of state review of such proceedings. In Virginia, the first level of collateral review occurs in the Virginia Supreme Court.

Even if the Equal Protection Clause would not ordinarily require the appointment of counsel for collateral review in Virginia courts, this Court should require counsel when life is at stake. The Equal Protection Clause does not remove all disadvantages suffered by the poor. But when a state proposes to execute an individual, the strongest possible case exists for attempting to assure that a particular defendant's poverty is not the factor that makes the difference in whether the defendant is executed or spared. See e.g., Ake v. Oklahoma, 470 U.S. at 76-77.

A decision not to require counsel in Virginia collateral proceedings means that an uncounseled, possibly illiterate or barely literate prisoner under sentence of death must make the legal and tactical decisions, binding under Virginia law, that

will control the ultimate shape of review of that sentence. This result offends the guarantees of both the Due Process and Equal Protection Clauses. Certainly the obstacles faced by an indigent prisoner confined to Death Row in preparing a Virginia habeas petition alleging ineffective assistance of counsel and involving facts outside the record are even greater than those that Clarence Gideon faced in attempting to represent himself without a lawyer on a charge of burglary. Gideon, supra. To deny counsel in state collateral proceedings under these circumstances is to fail to give effect to the concerns for fundamental fairness that animated Gideon.

III. THE DECISION BELOW CORRECTLY ASSURES
MEANINGFUL ACCESS TO THE COURTS FOR
VIRGINIA DEATH ROW INMATES AS REQUIRED
BY BOUNDS v. SMITH

In Bounds v. Smith, 430 U.S. 817, 828
(1977), this Court held "that the funda-
mental constitutional right of access to
the courts requires prison authorities to
assist inmates in the preparation and
filing of meaningful legal papers by pro-
viding prisoners with adequate law librar-
ies or adequate assistance from persons
trained in the law." Applying that princi-
ple in Bounds itself, this Court upheld a
district court plan designed to "assure the
indigent defendant an adequate opportunity
to present his claims fairly." Id. at

823.^{14/} As defined by the Court, the
relevant constitutional inquiry "is
. . . whether law libraries or other forms
of legal assistance are needed to give
prisoners a reasonably adequate opportunity
to present claimed violations of fundamen-
tal constitutional rights to the courts."

^{14/} The plan adopted by the district court in
Bounds provided for law libraries in conjunction
with an inmate self-help training program under
which prisoners would be trained as research
assistants to aid fellow prisoners. Id. at 820.
In approving the district court's choice of
remedy, this Court recognized that a state may
choose among a variety of alternatives to satisfy
Bounds, including:

the training of inmates as paralegal
assistants to work under lawyers'
supervision, the use of paraprofessionals and
law students, either as volunteers or in
formal clinical programs, the organization of
volunteer attorneys through bar associations
or other groups, the hiring of lawyers on a
part-time consultant basis, and the use of
full-time staff attorneys, working either in
new prison legal assistance organizations or
as part of public defender or legal services
offices.

Id. at 831.

Id. at 825. "[T]he touchstone," the Court stated, is "meaningful access to the courts." Id. at 823, quoting Ross v. Moffitt, 417 U.S. at 611.^{15/}

By requiring Virginia to provide death-sentenced prisoners with counsel in state post-conviction proceedings, the district court did no more than what was required by the rationale of Bounds. The district court made findings of fact based upon the record that indicated that the Commonwealth was not in compliance with its obligation to provide meaningful access to the courts to death-sentenced prisoners. As respondents' statement of facts demonstrates, the district court findings are amply supported by the record. Adhering to

^{15/} The Bounds Court emphasized that legal assistance for prisoners is particularly important in the context of collateral attacks and civil rights actions. Bounds, 430 U.S. at 827-828.

this Court's instruction in Anderson v. City of Bessemer City, 470 U.S. 564 (1985), the Court of Appeals refused to disturb these findings as clearly erroneous. 847 F.2d at 1121. Nor did the Court of Appeals find that the district court abused its discretion in fashioning the remedy selected. Id., citing Milliken v. Bradley, 433 U.S. 267 (1977).

A. Virginia's Law Library Plan Does Not Satisfy Its Obligation Under Bounds v. Smith

Experience has shown that prisoners who are not permitted direct access to a law library, and must rely solely on a paging system, are denied meaningful access to the courts. This is precisely the situation at two of Virginia's three facilities confining death-sentenced prisoners. By opting for this system, the Commonwealth places itself at odds with a long line of

cases that have rejected similar paging systems. See Toussaint v. McCarthy, 801 F.2d 1080, 1110 (9th Cir. 1986); Green v. Ferrell, 801 F.2d 765, 772 (5th Cir. 1986); Morrow v. Harwell, 768 F.2d 619 (5th Cir. 1985); Corgain v. Miller, 708 F.2d 1241, 1250 (7th Cir. 1983); Williams v. Leeke, 584 F.2d 1336, 1338-39 (4th Cir. 1978), cert. denied, 442 U.S. 911 (1979). The reasons why a paging system does not afford sufficient Sixth Amendment protection were most cogently articulated in the Fourth Circuit's decision in Williams v. Leeke, 584 F.2d at 1339:

Simply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful chance to explore the legal remedies he might have. Legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar adverse precedent. New theories

may occur as a result of a chance discovery of an obscure or forgotten case. Certainly a prisoner, unversed in the law and the methods of legal research, will need more time or more assistance than the trained lawyer in exploring his case. It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult.

Unless it can be said that death-sentenced prisoners at these two facilities are gaining access to the courts through other means -- a claim the record belies -- Virginia has failed in its Bounds obligation to these prisoners.^{16/}

^{16/} One of the facilities at which Death Row prisoners are denied direct access to the law library is the Virginia State Penitentiary. This is the institution where death-sentenced inmates are confined for the final two weeks preceding execution. Va. Code §3.1-234. It undermines the principles announced in Bounds to deny Death Row inmates access to a law library at a time so close to execution.

At Mecklenburg Correctional Center (where the majority of death-sentenced inmates are confined), the policy is different: prisoners are allowed two half-day periods in the law library weekly. In practical terms, however, the result is the same. While most prisons can boast of a handful of "jailhouse lawyers," prisoners by and large are unschooled in the law and the methods of legal research. The problem is particularly acute for the large number of illiterate and Spanish-speaking prisoners.^{17/} See Bounds v. Smith, 430 U.S. at 823-824; Wolff v. McDonnell, 418 U.S. 539, 578 (1974). Even a well-stocked prison library is inadequate, therefore, to satisfy Bounds in the absence of an effective

^{17/} See n.7, supra.

plan for providing prisoners with the realistic assistance they need.

Indeed, the history of Bounds following its remand from this Court underscores the inadequacy of a library plan as a means of achieving meaningful access to the courts. See Smith v. Bounds, 813 F.2d 1299 (4th Cir. 1987), aff'd en banc, 841 F.2d 77, cert. denied, 109 S.Ct. 176 (1988). After reviewing a decade of unsuccessful efforts by the state to implement the plan approved by this Court in Bounds, including the training program for inmate paralegals to assist fellow prisoners, the Court of Appeals affirmed the trial court's order providing prisoners with attorney assistance in conjunction with the operation of a law library. Id. at 1301-02.^{18/}

^{18/} Numerous cases following Bounds have found law library plans inadequate. See Valentine v. Beyer,
(continued...)

In this regard, too, the problems of Death Row inmates are especially acute. As the district court correctly found, persons on Death Row suffer handicaps and face special complexities that render them incapable of using law books to raise their claims.^{19/} Under Bounds, the state is obligated to respond to those needs and

^{18/} (...continued)
850 F.2d 951, 956-957 (3d Cir. 1988); Cruz v. Hauck, 627 F.2d 710 (5th Cir. 1980); Hadix v. Johnson, 694 F.Supp. 259 (E.D.Mich. 1988); Canterino v. Wilson, 562 F.Supp. 106 (W.D.Ky. 1983).

^{19/} Three considerations led the district court to the conclusion that Death Row access to the courts was inadequate:

- (1) the limited amount of time Death Row inmates had to prepare and present their petitions to the courts;
- (2) the complexity and difficulty of the legal work; and
- (3) the emotional instability of inmates preparing themselves for impending death.

Giarratano v. Murray, 668 F.Supp. 511, 513 (E.D.Va. 1986).

provide whatever assistance is necessary to render the right of access meaningful. As discussed below, the Commonwealth's response to its obligation was to establish a "patchwork system of assistance" that did little to enhance the meaningfulness of the access death-sentenced prisoners have to the courts. Giarratano, 668 F.Supp. at 515. That response is patently inadequate.

B. Virginia's Plan For Legal Services Does Not Satisfy Its Obligation Under Bounds

In Bounds, this Court stated that among the alternatives by which a state may provide prisoners with meaningful access to the courts is the hiring of lawyers. Bounds, 430 U.S. at 831. In an effort to fulfill this obligation, Virginia has opted to provide the services of seven part-time lawyers. They are expected to meet the needs of not only the thirty-two prisoners

on Death Row, but also those of over two thousand other prisoners. Not surprisingly, the scope of their assistance is very limited. They neither sign pleadings nor make court appearances. They are relegated to the role of legal advisor only, or to borrow the phrase of one such attorney, they function as "talking law books." Giarratano v. Murray, 668 F.Supp. at 514.

The state made no pretense at trial that these few attorneys could handle the needs of Death Row prisoners in addition to providing assistance to other inmates. The district court's findings in this respect are unequivocal:

Although no institutional attorney has helped to prepare the habeas corpus petition of a single death row inmate, the testimony at trial indicated that each attorney could not adequately handle more than one capital case at a time. Moreover, they are not hired to work full time; they split time between their

private practice and their institutional work.

Id. at 514.

In addition to the contract services provided by these attorneys, Virginia courts have the authority to appoint counsel to any indigent inmate in a state post-conviction proceeding. Va.Code §14.1-183. In practice, appointments are made under this provision only after a petition is filed by the inmate and then only if a non-frivolous claim is raised.^{20/} Darnell v. Peyton, 208 Va. 675, 160 S.E.2d 749 (1968). The existence of this statute is relied upon by the Commonwealth as evidence that it is meeting its obligation under Bounds.

^{20/} This limitation does not appear on the face of the statute but petitioners noted it in their brief. See Petitioners' Brief at 6.

The short answer to this defense, however, is that Bounds specifically rejected a parallel argument based on a North Carolina statute similar to the one on which Virginia relies here. The Bounds Court stated the following:

Since our main concern here is "protecting the ability of an inmate to prepare a petition or complaint," it is irrelevant that North Carolina authorizes the expenditure of funds for appointment of counsel in some state post-conviction proceedings for prisoners whose claims survive initial review by the courts.

430 U.S. at 828 n.17 (citations omitted).^{21/}

Finally, we urge this Court to recognize, as the district court did, that

^{21/} Moreover, as the district court correctly found, even assuming that all Death Row prisoners with meritorious claims are capable of filing petitions with at least one nonfrivolous ground, the delay in receiving comprehensive assistance of counsel may be devastating because of the waiver provisions of Virginia law discussed above.

because of the complexity, cost, and protracted nature of death penalty litigation today, very few attorneys are willing to volunteer their time to represent Death Row prisoners in post-conviction efforts.

Giarratano, 668 F.Supp. at 515. The financial and emotional toll is staggering. The amicus brief of the American Bar Association (ABA) submitted in this case comprehensively addresses this unfortunate state of affairs, and argues persuasively for the appointment of counsel in post-conviction proceedings. As the number of death-sentenced prisoners continues to increase nationwide, there is no indication that the number of attorneys willing to represent them is increasing proportionately.

Indeed, the evidence proffered at trial and presented by the ABA directly refutes that

suggestion.^{22/} The stakes are simply too high to entrust the lives of nearly two thousand condemned prisoners^{23/} to the chance that some lawyer will provide his or her services voluntarily.

^{22/} In addition to other impediments, Death Rows are frequently located in remote areas that are difficult for counsel to reach. Mecklenburg itself is an eight hour round-trip drive from Washington and a five hour round-trip from Richmond. As late as 1984, it was not uncommon for attorneys of this office to have to wait hours before seeing their clients, only to see them in shackles. Brown v. Landon, Civ. No. 81-0853-12 (E.D. Va. Oct 2, 1984) (bench opinion granting preliminary injunction). This kind of environment certainly does not encourage counsel to step forward.

^{23/} Capital Punishment 1987, supra n.7.

CONCLUSION

For the reasons stated herein, the decision below should be affirmed.

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